

the FERC-prescribed uniform system of accounts, grounding systems cannot be considered part of the pole cost to be assigned to cable. If the Commission were to consider the addition of grounding systems into the rate formula, their inclusion would have to be spread across utility investment in its entire distribution network, because grounding systems are designed to protect the entire distribution network, not just those select accounts related to poles.⁶³

B. Proposed Adjustment To The Depreciation Reserve (The Southwestern Bell Petition)

1. The Southwestern Bell Petition

In 1994, Southwestern Bell Telephone ("SWBT") first brought to the Commission's attention a minor anomaly (which SWBT leveraged into massive rate increases throughout its five-state area) in the pole attachment formula occurring in very unusual circumstances. The anomaly arises if a utility is carrying poles as a negative rate base item, which in turn arises from an extremely aggressive accounting for "negative net salvage." Until relatively recently, standard depreciation practice was to amortize historic investment over the anticipated useful life of the pole, such as 1/40 years or 2.5%. Sometimes an adjustment would be made to account for the anticipated costs of removal, where removal was expected to exceed salvage value. Let us illustrate first with a modest example. If "negative net salvage" was expected to equal 5% of the original cost of the pole, the current depreciation allowed would be $(1+.05)/40$, or 2.63%. As utilities found it convenient to maximize cash flow to finance new ventures, their estimates of

of poles, towers, and appurtenant fixtures used for supporting overhead distribution conductors and service wires." *Id.* (Account 364).

⁶³ While the Commission did not specifically raise the issue of tree trimming and right-of-way maintenance expenses, the utilities raised it in their White Paper. Today, these costs are addressed by utilities and attaching parties in a variety of ways on a market-by-market basis. There is no evidence that this approach is not working, or that the Commission needs to address this issue at this point.

the costs of compliance with environmental and disposal rules soared. The negative net salvage estimates was no longer 5%, but increased in some cases to \$120 for disposing of an original investment of only \$100 of plant. The *anticipated costs of removal* were added to the derivation of the depreciation, $(1+1.2)/40$. In such a case, the current depreciation charge increased to 5.5%, and cash flow increased.

But soon reality caught up. Suppose that the costs of disposal are not so high, or actual retirements are postponed beyond predicted useful lives, or both. In either case, the rate base erodes rapidly until it is negative. Stated another way, the total depreciation taken over the *actual* (as opposed to estimated) useful life of the pole exceeds the original investment.

2. The Commission's Proposal

The utility's recovery of cost of removal from its ratepayers through depreciation charges over time has created, in effect, a regulatory asset on which SWBT seeks to earn a return. The Commission has adopted a reasonable solution which results in only minor adjustments to the formula, but which prevents the utilities from recovering the cost-of-removal investment made by others over time.

The Commission proposes that only in those rare circumstances in which the utility confronts this anomaly and has a negative rate base for poles, should the cost of removal (or negative net salvage value) be removed from the poles' depreciation reserve. To compensate for this removal, and to reflect the fact that the utility already has fully recovered the pole assets, the Commission proposes adjustments to the way in which the carrying charges should be calculated. While this does allow the utility, in essence, to avoid reflecting in the pole rate the benefit it has received through depreciation charges for its future costs of removal, on balance, the

Commission's proposal represents a sound mix of accounting consistency and regulatory policy, and is consistent with the "operating margin" method of rate setting which is used when no rate base exists. Regulatory agencies faced with utilities' possessing no rate base traditionally have turned to the operating ratio method to assure a fair return.⁶⁴

First, the Commission proposes to calculate the return element of the carrying charge on the pre-adjustment balance of ratebase. The product of this calculation would be a negative return element, which then would be added to the other carrying charges. We believe that this approach is essential to remove from the rate calculation the return which has been calculated on investment which has already been fully recovered through depreciation and funded in part through zero-cost ratepayer capital. Stated another way, utility ratepayers have compensated the utility for all of its pole investment, making it entirely inequitable to continue to impose a return element on the ratepayers for the very assets for which they already have paid. Calculating the return component and removing it from the rate calculation makes part of this adjustment.

The Commission also proposes to eliminate the income tax carrying charge, essentially because there would be no income-based tax if there is no return component. We

⁶⁴ See, e.g., *Hamm v. South Carolina Pub. Serv. Comm'n*, 422 S.E.2d 118, 122 (S.C. 1992) (water and sewage utility); *Parks v. Rent Control Bd.*, 526 A.2d 685, 686 (N.J. 1987) (rent control); *Hamm v. South Carolina Pub. Serv. Comm'n*, 344 S.E.2d 600, 602 (S.C. 1986) (motor carrier services); *Public Serv. Comm'n v. Dewitt Water Dist.*, 720 S.W.2d 725, 729 (Ky. 1986) (water utility); *State Ex. Rel. Util. Comm'n v. Public Staff*, 343 S.E.2d 898, 901 (N.C. 1986) (water utility); *Texas Indus. Traffic League v. Railroad Comm'n*, 683 S.W.2d 368, 369 (Tex. 1984) (railroad); *State, etc. v. Intervenor Residents, etc.*, 278 S.E.2d 761, 766-67 (N.C. 1981) (water and sewer utility); *In the Matter of Wilmington Suburban Water Corp. for a General Increase in Rates*, Slip Op. No. 82A-JN-6 (Del. 1982) (water utility); *Moore v. Arkansas Transp. Co.*, 606 S.W.2d 575, 576 (Ark. 1980) (transport company); *Casco Bay Lines v. Public Util. Comm'n*, 390 A.2d 483, 490-91 (Me. 1978) (shipping); *Guida v. Public Util. Comm'n*, 348 A.2d 613, 617 n. 4 (Conn. 1974) (motor transit companies); *Commonwealth v. Federal Maritime Comm'n*, 468 F.2d 872, 874 (D.C. Cir. 1972) (shipping); *D.C. Transit Sys. v. Washington Metro. Area Trans. Comm'n.*, 350 F.2d 753, 759 (D.C. Cir. 1965); *Florida Rate Conference v. Florida R.R. and Pub. Util. Comm'n*, 108 So.2d 601, 603 (Fla. 1959) (common carrier motor freight lines).

agree that this is the logical corollary to removing the return component. Mechanically, one would need to look only at Account 7240 (on the ARMIS 4202) to permit recovery of taxes other than income taxes.

Therefore, the only carrying charges that still would apply to the fully depreciated poles would be the administrative and maintenance components, and a negative return element. Attached as Exhibit 12 is a hypothetical calculation demonstrating application of the adjusted formula.⁶⁵

3. A "Safety Valve" Default Calculation

The Commission also expresses concern with the logistics of extracting the costs of removal from the depreciation reserve of pole plant. It would be essential to require a utility employing this method to provide all of the necessary depreciation records from which the accumulated negative net salvage could be unbundled from historic recovery of original cost. If the information is not produced or sufficiently comprehensive, however, the utility has failed in its burden to provide sufficient information enabling the reliable disaggregation of the accumulated depreciation charges attributable to negative net salvage, and the pole rate should remain at the level it was at for the last year that the rate base remained positive.

4. Gross vs. Net Calculations

We do not believe that in the rare occasions that this situation does arise it should be resolved by performing rate base calculations on a gross rather than a net basis. There is a long-recognized and well-founded preference in favor of calculating rate base items on a net basis because it reflects prior recovery of investment through depreciation, and prevents utility

⁶⁵ See Ex. 11.

overrecovery of actual amounts invested.⁶⁶ Moreover, performing these calculations on an "all gross" basis is a misnomer, in that the net rate base must be calculated even in an all gross computation. This is because the rate of return is calculated for application to net rate base, and must be grossed down by the ratio of net to gross rate base for application to net.⁶⁷ Thus, in order to properly calculate the applicable return element, it is necessary first to calculate that rate on a net basis prior to applying it to gross. No steps are saved in an all-gross calculation. Administrative expediency favors performing the entire calculation on a net basis in the first instance, and there are no regulatory or administrative efficiencies to be gained by moving to all-gross calculations.

5. Adjustment To Depreciation Rate

In all cases, whether or not confronting the Southwestern Bell situation, the formula must be cautious in grossing up the depreciation rate for application to net pole investment. If the depreciation rate that the FCC or state PSC prescribes for utility poles is for application to the utility's net book asset for the investment, then there should be no gross up of the depreciation charge factor as is currently done under the pole formula. The formula should only gross up the depreciation element if it has been prescribed for application to gross plant, not net plant.

⁶⁶ See, e.g., *Telecable of Piedmont, Inc. v. Duke Power Co.*, PA No. 90-0003, DA 95-1362 (June 15, 1995); *Riverside Cable TV, Inc. v. Arkansas Power and Light*, PA No. 85-0001, Mimeo 4813 (May 30, 1985).

⁶⁷ For example, suppose a utility is authorized an 11.25% return on a gross rate base of \$200, and that the rate base is 50% depreciated. In an "all net" calculation, the authorized return percentage would be 11.25% and the return component would be $11.25\% * (\$200 - \$100) = \$11.25$. In an all gross calculation, the authorized return would be $11.25\% * [(\$100/\$200)] = 5.625\%$, and the authorized return component would be $5.625\% * \$200 = \11.25 .

IV. PROPOSED MODIFICATIONS TO THE CALCULATION OF CARRYING CHARGES

The Commission's conversion from Part 31 to Part 32 accounting made it impossible to map exactly the old Part 31 accounts to the new Part 32 accounts. In part this is because there are many entirely new account (and subaccount) categories which simply did not exist under the old Part 31 system, but for which now attaching parties are responsible under the pole formula as it *currently* stands. With guidance from a letter from Commission staff,⁶⁸ however, the cable operators and pole owners alike have made a relatively smooth transition in adopting new Part 32 accounts to the pole formula. Generally, the industry has interpreted the Staff letter to require that Account 6411, less rents, be incorporated into the maintenance carrying charge. The rent component then would be added to the administrative charge which would also consist of Accounts 6720 (General and Administrative) and Account 6710 (Executive and Planning). It has been widely recognized that there has not, and cannot, be one-to-one account mapping from Part 31 to Part 32.⁶⁹ Approaching the calculation of the carrying charges in this fashion has served a number of important principles.

First, it has avoided imposing on attaching parties a double charge for electric utility pole rents (but not completely eliminated it, because it still allows for the flow-through of some portion of rents to the administrative charge). We believe that the most economically precise approach would be to completely eliminate rents from *any* component of the carrying charge factor. The rents component of Account 6411 consists of rents paid by the telephone company to electric utilities for the telephone company's use of electric poles. Because cable

⁶⁸ Letter from Kenneth Moran to Paul Glist, 5 F.C.C.R. 3893 (1990).

⁶⁹ See Declaration of Patricia Kravtin ¶ 17 (hereinafter "Kravtin Decl.").

operators pay rental fees to telephone companies for attachment to their poles, and independently pay rental fees to the electric company for attachment to power poles, inclusion of the rents component in the 6411 maintenance account would result in the attaching party's subsidizing the telephone company's pole rentals, and paying the electric company rental fees twice.⁷⁰

Second, the approach that has been followed since Part 32 conversion has allowed pole owners and attaching parties to continue to rely on publicly filed information. When this conversion occurred, certain elements that previously were publicly reported under Part 31 were transferred into non-public internal telephone company subaccounts. Moreover, as we will demonstrate, what may have been excluded from the formula as a result of conversion to Part 32 has been offset by what has been newly added as a result of the conversion.

There are a number of other potential sources of overrecovery as a result of USOA conversion as well. For example, because the current formula allocates administrative costs across the pole investment only on the basis of the dollar value of that investment, without consideration of the "nature" of those assets and the amount of administrative oversight they are likely to necessitate, the formula essentially allows the telephone company to recover for poles proportionally as much research and development expense as it incurs for highly complex technological and business planning. The notion that pole plant requires the same proportional amount of administrative oversight as a switch or a competitive response to a CLEC simply is not credible.⁷¹

⁷⁰ Kravtin Decl. ¶ 18.

⁷¹ Kravtin Decl. ¶ 19.

A. Administrative Charge

1. Part 32 Accounts 6720 and 6710 Reasonably And Generously Track the Categories Of Expenses Previously Recovered Under Part 31

Since the conversion from Part 31 accounting to Part 32 accounting, there has been little dispute between pole owners and attaching parties that Accounts 6720 (General and Administrative) and 6710 (Executive and Planning)—which cover a broad spectrum of administrative costs—should be included in the administrative component.

Account 6720 itself is comprised of the accounts for accounting and finance,⁷² external relations,⁷³ human resources,⁷⁴ information management,⁷⁵ legal,⁷⁶ procurement,⁷⁷ research and development,⁷⁸ and the catchall "other general and administrative."⁷⁹ Even without the "other general and administrative" account (Account 6728), Account 6720 contains a comprehensive set of administrative expenses and functions with any conceivable nexus to administration of the pole resource. Equally important, the Part 32 6710 and 6720 account groupings are the precise analogs to Part 31 account groupings of non-plant specific administrative overhead appearing at lines 56 and 67 of the Part 31 Form M. In other words, 6710 and 6720 are to Part 32 what lines

⁷² 47 C.F.R. § 32.6721.

⁷³ 47 C.F.R. § 32.6722.

⁷⁴ 47 C.F.R. § 32.6723

⁷⁵ 47 C.F.R. § 32.6724

⁷⁶ 47 C.F.R. § 32.6725

⁷⁷ 47 C.F.R. § 32.6726

⁷⁸ 47 C.F.R. § 32.6727

⁷⁹ 47 C.F.R. § 32.6728.

56 and 67 are to Schedule 35 of the Part 31 Form M (p. 57).⁸⁰ The Part 32 expense accounts that the telephone companies now propose adding into the formula are no more related to corporate overhead than the categories of administrative, advertising, and marketing expenses which were excluded under Part 31.⁸¹

Indeed, the human resources, information management, procurement and research and development items for which attaching parties are now responsible since the changeover to Part 32 find no analogs in Part 31.

The present accounting already may be overly generous to the utilities. For example, Account 6710 includes costs for formulation of corporate policy and long-term economic and strategic planning. The Part 31 account included in the pole formula prior to Part 32 conversion conceptually closest to 6710, is Account 661 (Executive department). There was no separate provision for "the costs incurred in developing and evaluating long-term course of action for the future operations of the company . . . [including] corporate organization and integrated long-range planning, including management studies, options and contingency plans, and economic strategic analysis"⁸² under Part 31 as there is now under Part 32. We are concerned that pole rents already include payment for an ILEC's strategic planning. We are even more troubled that cable is responsible for significant expenses under Part 32 for which cable was not responsible under Part 31.

⁸⁰ See, e.g., Ex. 12 (Sample Form M of C&P Tel. of Maryland for year end 1986).

⁸¹ Kravtin Decl. ¶ 22.

⁸² 47 C.F.R. § 32.6712.

2. Additions To The Proposed Additional Accounts Will Double Charge For Expenses Already Covered in Makeready

Rather than recognizing the generosity of the current formula, the Commission has proposed the inclusion of four additional accounts that have little or no relation to administration of the pole resource which, if included, would drive pole attachment costs to higher levels. Attached as Exhibit 14 is a spreadsheet calculation (using data contained in Bell Atlantic Maryland's 1996 ARMIS Report) demonstrating that the proposed account additions to the maintenance component of the carrying charge will *double* the administrative expenses and the administrative carrying charge. As explained in detail below, the items booked to these (and other) accounts, moreover, are covered by the up-front makeready expenses that a cable operator must pay prior to attachment, including mandatory markups and overhead.

In order to attach its facilities to a pole, various communications and electrical facilities attached to the pole may have to be adjusted prior to making the new attachment. If rearrangement of existing facilities alone cannot accommodate the new attachment, then the cable operator must pay for the pole to be replaced. In most cases, the utility pole owner performs this rearrangement and pole replacement work. Prior to doing so, however, the cable operator must pay the utility *in advance* for such work, the charges for which the utility sets unilaterally and which often include an "overhead" element or across-the-board markup of 10% or more of the charges.⁸³ Including the proposed accounts will double charge cable operators.

⁸³ Pietri Decl. ¶¶ 4-6.

3. Addition Of The Proposed Additional Accounts Is Inconsistent With Appropriate Pole Pricing Principles

The Commission must carefully consider whether the addition of new accounts to the administrative carrying charge in fact represents greater ratemaking precision or simply pole rate inflation. Rational ratemaking does not require the inclusion of every conceivable account and cost item which accountants can theoretically attribute to pole attachments.⁸⁴ Under Section 224, and in ratemaking generally, rates need only be within the compensatory range between incremental and fully allocated costs. The current pole formula pushes rates to the fully allocated top end of the range allowed by the Communications Act, but any rate set between incremental and fully allocated costs is by statutory definition "just and reasonable."

By analogy, one may look to the Commission's pricing of unbundled network elements. The FCC has found that unbundled telecommunication network elements and traffic termination services should be priced on an incremental cost basis.⁸⁵ In adopting the incremental cost approach for unbundled network elements and transport services, the Commission specifically rejected ILEC arguments that such elements and services be set on a fully allocated basis.

In numerous cases concerning the pricing of wholesale communications services, this Commission (and other regulators) have found that it is appropriate to allocate only a *portion* of accounts or account groupings to the pricing of such elements. Because pole rents themselves

⁸⁴ Compare *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Permian Basin Rate Cases*, 390 U.S. 747 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

⁸⁵ *Local Competition Provisions In The Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, ¶¶ 618-815, ¶¶ 638-639, 672 (Aug. 8, 1996).

may be lawfully priced at incremental cost, there is no compelling reason to adjust the formula to move pole pricing still further away from incremental cost. Moreover, there are compelling reasons *not* to do so. To fine-tune the administrative carrying charge would require one of two choices. One could rely on internal data to separate the relevant expenses from the irrelevant and to eliminate double charges, and thereby sacrifice the simplicity which has animated pole regulation and facilitated settlements outside of FCC processes. Or, one could consciously build in overcharges into the carrying charges, and thereby sacrifice the purpose of the rules to preclude such overcharges.

Nothing compels the sacrifice of all of the benefits of administrative simplicity to attempt to reach the elusive goal of theoretical "perfection" by pursuing one-to-one mapping from Part 32 to Part 31. The inclusion of Accounts 6720 and 6710 alone is more than compensatory. The sample calculation using the 1996 ARMIS data of Bell Atlantic of Maryland shows that the addition of the proposed administrative accounts would increase the administrative carrying charge by nearly 100% without compensating virtue.⁸⁶ Our specific comments on the proposed additional accounts are set forth below.

4. Account 6535 Engineering Expense

The Commission proposes to incorporate Account 6535, Engineering Expense, into the administrative component. While (as we explain below) none of the other three accounts that the Commission has proposed should be incorporated in the administrative carrying charge, inclusion of the ILECs' engineering expenses is particularly inappropriate. Any engineering,

⁸⁶ See Ex. 13. In addition to the contemplated addition of accounts, the Commission proposes excluding certain accounts from the administrative charge. See Notice ¶¶ 32-33. We fully concur with the Commission's proposals in this regard and note that these accounts generally have been excluded in the ratesetting process.

whatsoever, associated with third-party attachments, like those of cable operators, are paid by that party. Often, the party seeking attachment must pay twice for the same engineering.

Pole attachment procedures that have developed between utility pole owners and cable operators over the years require that cable operators submit applications to the utilities prior to attaching any facilities to the poles. The application forms that cable operators are required to submit require the cable operator to provide drawings and other information concerning the facilities its proposes to attach to the poles and any makeready work that must be performed prior to attachment. To do this, the cable operator, or an independent engineering subcontractor retained by the cable operator, must conduct pre-attachment, pre-application, engineering.

After the application is submitted, the utility pole owner conducts its own engineering review to confirm the accuracy of the applications and makeready projections made by the cable operator in its application. Cable operators are separately charged for the independent engineering and makeready work that the pole owner performs.⁸⁷ When separate engineering work is required for subsequent attachments, or modifications of existing attachments, the Communications Act and the Commission's rules require that the expenses associated with such work be borne by the party requiring it.

Thus, whenever any engineering work associated with pole attachments must be performed, that work is billed on an incremental, per-event basis. As Patricia Kravtin states in the attached Declaration, paying engineering costs on a per-transaction basis as they arise is a far more reliable and economic means of compensation to the utility for any costs incurred in

⁸⁷ Coincidentally, many utilities today are stepping up their unlawful efforts to collect engineering charges over and above actual engineering costs incurred.

connection with third-party attachments.⁸⁸ Under current practice, however, cable operators pay engineering expenses for each new attachment or modification project *at least* twice: once in order to prepare the application, and, again for the utility pole-owner's required pre-attachment inspection. Utilities often attempt to collect an additional engineering charge for post-attachment inspection. Inclusion of Account 6535 in the administrative charge would unreasonably include a third (or fourth) layer of engineering expenses into the annual rental rate, and for all these reasons should be excluded.

5. Account 6110 Network Support Expenses

Account 6110, Network Support Expenses, aggregates a number of different accounts that, assuming their theoretical applicability to third party pole attachments, relate to items for which cable operators and other attaching parties already are entirely responsible (and the telephone utilities entirely compensated) by advance makeready payments. In addition to the engineering costs explained immediately above, makeready also includes material (with mark-ups), labor, vehicles, and general "overheads" often as high as 10%.⁸⁹ While we do not dispute that telephone utilities sometimes use their vehicles to inspect (at the time of attachment) cable operator facilities,⁹⁰ the makeready and engineering payments utilities require of attaching parties

⁸⁸ Kravtin Decl. ¶ 37.

⁸⁹ *Cable Television Ass'n of Maryland, Delaware and the District of Columbia, et al. v. Chesapeake and Potomac Tel. Co. of Maryland*, PA No. 88-002 (affidavit of Claire Feldman at ¶ 8) (filed March 10, 1988).

⁹⁰ Just as telephone company rideouts or inspections at initial attachment are paid for entirely by cable, so too are subsequent inspections and surveys of cable plant, which provide the telephone company with additional sources of recovery for 6110-type expenses.

already cover any vehicle, or vehicle-related costs contained in the 6110 package of accounts.⁹¹ In addition, we are unaware of any comparable account under Part 31 included in the pole formula in which included the extensive vehicle (including aircraft) and vehicle-related charges.

6. Account 6120 General Support Expenses

The Commission seeks comment on the inclusion of Account 6120, General Support Expenses. Account 6120, like 6110 addressed immediately above, aggregates a number of accounts that are fully covered by Account 6720 (General and Administrative), or that cover items that the cable operator pays for entirely in up-front makeready payments.

For example, one of the accounts, 6121, includes the costs of lands and buildings, in addition to containing the costs for janitorial service, and cleaning supplies, while another, 6122, includes the costs associated with furniture and artworks. While we do not dispute that workers require furniture to generate pole attachment bills to cable operators, we believe that such costs are adequately covered in other expense accounts, and that the inclusion of telephone company artwork in pole attachment rates is inappropriate. We are unaware of old Part 31 accounts for which cable operators were responsible under the pole formula for such items as janitorial supplies and service, furniture, and artwork.

⁹¹ One 6110 group account that has no relevance whatsoever to third-party attachment is Account 6113, "Aircraft expense." The description states:

- (a) This account shall include such costs as aircraft fuel, flight crews, mechanics and ground crews, licenses and inspection fees, washing, repainting and minor accessories.

47 C.F.R. § 32.6113(a). In addition to the fact that cable operators as part of their makeready and engineering expense pay all motor vehicle expenses necessitated by their attachments to the poles, we are unaware of any pole attachment made by a cable operator which has necessitated the use of telephone company aircraft.

7. Account 6534 Plant Operations Administration Expense

Next, the Commission considers the inclusion of Account 6534, Plant Operations Administrative Expense. Once again, this account contains items that the telephone company recovers through up-front makeready, or, that are duplicated in the 6720 accounts. They should be excluded for these reasons. Apart from these reasons, we are unaware of old Part 31 accounts for which cable operators were responsible under the pole formula for such items as "planning, coordinating and monitoring plant operations; and performing staff work such as developing methods and procedures, preparing and conducting training . . . and coordinating safety programs,"⁹² and believe that these items already are entirely covered in Account 6720.

B. Maintenance Expenses

The calculation of the maintenance expense component as currently prescribed under the pole attachment formula allows utility pole owners *at least* fair recovery of any maintenance costs associated with pole plant, and in fact may be permitting the pole owners to recover far more than their actual plant investment.

1. Exclusion of Rents

The Commission has already concluded that rents should be excluded from the administrative component of the carrying charge. This conclusion is proper because inclusion of this part of the account 6411 (and 6441 for conduits) matrix would result in cable operators' and other attaching parties' paying a portion of the pole (and conduit) rents that the telephone utility pays to electric utilities for attachment to electric support structures. This would result in a double charge: cable would pay the telephone and electric companies for its *own* pole

⁹² 47 C.F.R. § 32.6534.

attachments, but also a portion of the telephone company fees for use of utility poles.

2. Account 590 For Electric Poles Should Be Excluded From Maintenance

Account 593 (Maintenance of Overhead Lines) includes the costs of "labor, materials used and expenses incurred in the maintenance of overhead distribution line facilities, the book cost of which is included in account 364 Poles, Towers and Fixtures, account 365 Overhead Conductors and Devices, and account 369, Services"⁹³ and covers the maintenance costs directly attributable to the assets used for pole attachments. In this regard, this account contains the lion's share of pole-line maintenance costs for which cable operators and other attaching parties should reasonably assume responsibility in the pole rent. Account 590, however, which the electric utilities seek to add into the pole attachment rate, is designed to cover maintenance costs that have no little or no nexus to the pole network and attachment of communications facilities to such poles.

Maintenance expenses associated with poles, conductors and services (drops) are already accounted for in Account 593. The general engineering booked to Account 590 (Maintenance Supervision and Engineering) includes the cost of "labor and expenses incurred in the general supervision and direction of maintenance of the *distribution system*"⁹⁴ The distribution system includes storage battery equipment;⁹⁵ electric meters and similar equipment;⁹⁶

⁹³ 18 C.F.R. Pt. 101 Acct. 593.

⁹⁴ *Id.*, Acct. 590 (emphasis supplied).

⁹⁵ *Id.*, Acct. 363.

⁹⁶ *Id.*, Acct. 370 and 371.

and street lighting and traffic signals.⁹⁷ It clearly is inappropriate to include maintenance expenses associated with the maintenance of this plant.

If for any reason the Commission were to include Account 590, it would then need to ensure that the account was spread across the entirety of the utility's distribution investment, as opposed to just pole plant investment as the utilities advocate, because the entirety of the electric utility's distribution network benefits from these charges. For example, Georgia Power reports \$35,976,464 in maintenance expenses in Account 593 for the year end 1996. For the same period, Georgia Power reported \$14,853,111 in Account 590. If 590 were added to maintenance in the manner that the utilities propose, the maintenance carrying charge component would increase by over 41%. However, Account 590 would need to be apportioned in some manner, probably by time (ideally). If Account 590 were spread across the entire distribution plant by asset value, the maintenance factor would increase by about \$5 million, or 14.7%.⁹⁸

C. The Commission Should Adopt The "Default" 11.25% Rate-of-Return Figure, Or Its Realized Rate Of Return, Whichever Is Lower

We generally support the Commission's proposal to utilize a "default" 11.25% figure for the rate-of-return element of the carrying charge, but suggest a slight modification to the Commission's proposal. We suggest that the Commission adopt either the "default" 11.25% figure, or the actual *realized* rate of return figure that the utility has attained in the applicable reporting year, whichever is lower.

The 11.25% figure is appropriate because a number of state commissions have adopted incentive regulation for telephone utilities requiring use of outdated rate-of-return figures

⁹⁷ *Id.*, Acct. 373.

⁹⁸ *See* Ex. 14.

and because this figure is utilized in other FCC ratesetting contexts.⁹⁹ While we agree that reliance on old rate-of-return figures may not accurately reflect the utilities' cost of capital, we suggest that if the utilities' realized rate-of-return is lower than the 11.25% benchmark, this would represent a more equitable return.

Allowing a utility to secure a return greater than that realized across its entire regulated business, in effect, would allow the utility to turn its poles and conduits into a profit center by guaranteeing them a return — from their competitors — which exceeds the overall performance of all its regulated business operations.

V. THE COMMISSION'S CONDUIT RATE METHODOLOGY

The Commission's proposal to apply the conduit methodology announced in *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Company*¹⁰⁰ is well-founded. Ducts and conduits are no less essential to the provision of cable television and competitive telecommunications service than poles, and the same cost and pricing principles that apply to pole plant apply to underground conduit plant with equal force. Like pole plant, moreover, ducts and conduits are controlled virtually exclusively by the incumbent telephone and electric monopolies.

In downtown areas utility plant, including communications plant, typically must be constructed beneath city streets in underground manhole and conduit networks. In such areas conduit runs are installed between manholes. Conduit is the term that generally refers to the large concrete or metal (and in very old networks wood) pipe or structures into which a number of smaller plastic tubes, known as ducts, are installed. Most ducts are subdivided even further

⁹⁹ See Notice ¶ 37.

¹⁰⁰ 11 F.C.C.R. 11,202 (Sept. 3, 1996).

with a type of device known as innerduct. Conduit runs may contain as many as 12 or more ducts, with each such duct subdivided still further by four-, five-, or even six-compartment innerduct.¹⁰¹

A. The *Multimedia* and *Greater Media* Cases

The *Multimedia* case is a case study in unlawful exploitation of essential conduit facilities. Multimedia Cablevision, the cable operator in Wichita, Kansas, in the fall of 1994 was installing fiber optic facilities in downtown conduit as part of routine cable system upgrade. The project was proceeding smoothly. The telephone company was granting permit applications without delay, supplying access to manholes and conduit promptly, and generally being cooperative and helpful in assisting Multimedia with its project. This abruptly changed, however, the moment that the telephone company learned that Multimedia planned to use some of the fiber capacity it was installing as part of its cable upgrade for non-video telecommunications purposes. Pending applications that previously had been informally cleared for approval either were denied, or delayed indefinitely. Ducts that were empty were suddenly full, or reserved for future use. The cooperative spirit that existed prior to learning of some of the potential applications of the new fiber evaporated as the fiber upgrade project ground to a halt. Only after the direct intercession of City officials did the telephone company grant Multimedia access.¹⁰²

Several months after the City intercession and after construction was completed, however, the telephone company sent an invoice to Multimedia, in effect, double billing the cable operator for conduit occupancy. Each place where the operator had installed two (or more)

¹⁰¹ Declaration of Nicholas Theroux ¶ 3 (hereinafter "Theroux Decl.").

¹⁰² See *Multimedia Cablevision, Inc. v. Southwestern Bell Tel. Co.*, 11 F.C.C.R. 11,202 (Sept. 3, 1996) Complaint ¶ 14 (filed Dec. 30, 1994).

cables in a single duct, the rate would be two (or more) times the prevailing conduit rate, irrespective of the amount of duct that the communications conductor actually occupied. Because Multimedia succeeded in demonstrating to the Commission that even multiple communications cables typically occupy considerably less than an entire duct, the Commission adopted its half-duct convention which presumes that an attaching party occupies only one-half a duct.

The *Multimedia* case unfortunately is not unique. Beginning in the early 1980s, New England Telephone (NYNEX) imposed on Massachusetts cable operators a pole attachment rate that NYNEX *knew* to be above the statutory maximum.¹⁰³ After full adjudication before the Massachusetts Department of Public Utilities, and appeals to the Massachusetts Supreme Judicial Court, NYNEX was ordered to reduce its rate by approximately 56% below the rate that it had been charging cable operators previously.¹⁰⁴

The *Multimedia* and *Greater Media* cases, particularly with the advent of facilities-based competition in locations where communications plant must be installed underground, demonstrates the critical need for a rational, disciplined, and generally applicable conduit rate regime mirroring the pole attachments regime that has been so successful in facilitating alternative networks and innovative services by cable operators. That regime, subject to the modifications we suggest below, is already set forth in the Commission's *Multimedia* decision.

¹⁰³ See, e.g., *Greater Media, Inc., et al. v. New England Telephone and Telegraph Co.*, No. DPU 91-218, Tr. at 2-60; Ex. 9M-8 (Mass. Dept. Pub. Utils. April 17, 1992).

¹⁰⁴ *Greater Media, Inc., et al. v. New England Telephone and Telegraph Co.*, No. DPU 91-218 (Mass. Dept' Pub. Utils. April 17, 1992).

B. The Commission Should Adopt A One-Quarter Duct Convention In The Calculation Of Conduit Rates

The half-duct convention, while correctly reflecting the fact that new cable and telecommunications construction rarely occupies an entire duct, *Multimedia* does not go far enough, however, in replicating actual engineering, provisioning and underground construction practices for deployment of ducts and conduits. As Nicholas Theroux states, such practices routinely include the extensive use of a wide variety of inner-duct technologies that subdivide ducts into many separate conductor compartments.¹⁰⁵

Attached as Exhibit 16 is an advertisement from a leading manufacturer of inner-duct devices showing that certain of its products subdivide primary four-inch duct as small as two inches in diameter into as many as 6 inner ducts.¹⁰⁶ Indeed as long ago as 1981, the Bell System provided for the placement of four-compartment innerduct in 3-1/2 square and 4 inch ducts.¹⁰⁷

Given that fiber optic and coaxial cables occupy only a minuscule portion of available duct capacity, and the virtually universal use of multi-party inner duct in duct systems throughout the nation, we agree with the Commission that it should formally adopt the methodology set forth in the *Multimedia* case, but rather than the half-duct convention enunciated there, the Commission should adopt a quarter-duct convention.

Under this approach, the conduit rate formula would be adjusted so that cable

¹⁰⁵ Theroux Decl. ¶ 3.

¹⁰⁶ Ex. 15.

¹⁰⁷ Ex. 16 (Bell system outside plant construction placing methods, Section 628-200-215 Issue 1 § 1.03 (Feb. 1981)).

operators and CLECs would be presumed to occupy only $\frac{1}{4}$ of one duct, and it would be incumbent upon the conduit owner to prove that the attaching party occupied a greater portion of a duct, or the attaching party to show that it occupied less.¹⁰⁸ Given advances in innerduct technologies, and the use of thinner, higher capacity fiber-optic cables, we believe that the quarter-duct convention is quite conservative.

C. Duct Set-Asides For Emergency, Maintenance And Government Use

With respect to the conduit formula's presumption that maintenance or emergency duct is available for use by cable operators and others, and that there should be a presumption that conduit owners set aside one duct exclusively for municipal uses, our experience has been that neither of these presumptions is reflective of field practice, and that cable operators are not permitted to use the maintenance duct and municipal duct (where there is such a municipal set-aside) even in cases of emergency.¹⁰⁹ Instead, not all grants in location require municipal set aside (utility records would reveal those which do). Even if set aside duct is specified, there is no dedicated duct which is left for the exclusive use of the municipality. Instead, the duct might be subject to displacement when an application is made for use. In the meantime (which is to

¹⁰⁸ We agree with the Public Utilities that presumptions should continue to be relied on in the pole and conduit rate methodologies under consideration. *See* White Paper at 5. In many cases it may be difficult to ascertain the precise amount of usable space on a pole, or numbers of total available chambers within a single duct, or ducts within a given conduit run. Presumptions, must be just that: accurate empirically based estimates that can be rebutted by specific preemptive contrary evidence. The presumptions that we offer in these Joint Comments with respect to conduit plant accurately reflect field conditions. The existing presumptions in the pole attachment formula are similarly accurate. Therefore, the only departure from these presumptions that should ever occur is where there is such direct contrary evidence that proves the presumption not to be accurate in the particular case.

¹⁰⁹ *See, e.g.,* Theroux Decl. ¶ 4. Mr. Theroux testifies that in his 27 years of experience in communications and cable television engineering and construction, where a cable operator leased conduit or duct capacity from an ILEC, that cable operator would not have access to emergency or maintenance duct in the event of an emergency; use of that duct would be claimed by the ILEC. In addition, Mr. Theroux testifies that he was aware of no circumstance in which an ILEC or other conduit owner had set aside conduit for municipal uses. Theroux Decl. ¶ 5. For these reasons, emergency/maintenance duct should not be removed from the denominator of conduit rate formula allocator, and that all duct deployed should be presumed to be used for commercial applications.

say, in almost all cases) the duct is put to commercial use.¹¹⁰ Accordingly, maintenance and municipal set-aside should not be reflected in the conduit methodology, by reducing the average ducts per foot in the denominator of the carrying charge factor. In the event that the Commission does not determine that there should not be an exclusion of these ducts from the maintenance component of the carrying charge factor denominator, at a minimum, the Commission should place the burden on the utilities to prove their availability for use by cable operators and other attaching parties.

VI. NEGOTIATED TERMS AND CONDITIONS OF ATTACHMENT

In addition to the matters that the Commission specifically raised in the Notice, the utilities have raised a number of other issues. In their White Paper, the Public Utilities claim that the Commission should rely principally on negotiated arrangements between utility pole owners and attaching parties.¹¹¹ We agree. However, the Public Utilities imply that there exists equal bargaining power between the pole owners on the one hand, and the attaching parties on the other. There does not. They also imply that negotiations between utilities and prospective attaching parties proceed according to objective standards of commercial reasonableness. Likewise, they do not.

The Public Utilities routinely include unjust and unreasonable provisions in their adhesive pole attachment boilerplate which they then demand be signed "as is" without modification. Recent pole agreement "negotiations" have followed a number of different patterns. Some cable operators or competitive local exchange carriers are presented with an agreement and

¹¹⁰ Theroux Decl. ¶ 5.

¹¹¹ White Paper, Section II.A.

are told flat-out to sign the agreement as is. Often they do so because they (rightly) believe that there is no realistic hope that they will be able to effect any meaningful revisions, and because execution of the agreement, whatever its terms, is a pre-requisite for access to the essential poles, conduits and rights-of-way.¹¹²

Other attaching parties attempt to negotiate the agreements, offering detailed section-by-section legal analyses and proposals for alternative provisions that would accommodate both parties' legitimate contractual needs within the bounds of applicable law. In such cases, if the utility responds at all, and there is any utility accommodation on terms, it typically agrees to modify only the most minor points. In many other cases, the attaching party simply signs the agreement, often under protest. Only in the rarest of circumstances does a utility pole owner make meaningful concessions to its boilerplate agreement language.

The utilities control the essential corridors that cable operators and competitive telecommunications companies need to provide service. The utilities thus believe that every incentive exists for them to inflict harm on attaching third parties. The only reason that *any* concession is made is because there has existed before this Commission effective regulation of the rates, terms and conditions of pole attachments, which the utilities are using every means at their disposal to eviscerate.

Attached as Exhibit 18 is a letter sent to an electric utility in an effort to negotiate a pole attachment agreement with that utility. The cable operator was in the process of acquiring the system of another operator and initially had requested that the existing pole agreement be assigned. The utility, which is also a competing provider of telecommunications services, as

¹¹² *Id.*